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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY,
Petitioner,

vs.

CITY OF WEST UNIVERSITY PLACE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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INDEX.

Subject Index.

	Page
I. Summary statement of the matter involved	2
II. Opinions below	3
III. Jurisdictional statement	3
1. Statutory provision relied upon	3
2. Ordinance 129, the validity of which is involved	3
3. Date of judgment	4
4. The Federal questions were raised by pleading in the District Court	5
5. The Federal questions were overruled by the judgment of the District Court and were not reached by the Court of Civil Appeals	8
6. The Federal questions were overruled by the judgment of the Supreme Court	9
7. Ordinance 129 is a law passed by and a statute of Texas	11
8. The Federal questions are substantial	12
IV. Questions presented	12
V. Reasons relied on for the allowance of the writ	13
VI. Statement of the case	15
1. Petitioner's franchise	16
2. Ordinance 129	16
(a) Purpose of the ordinance	16
(b) Practical operation and effect	17
3. The holding of the Court of Civil Appeals	18
4. The holdings of the Supreme Court	18
VII. Specification of errors	20
VIII. Brief of argument	21
Summary of argument	21
Argument	21
1. Petitioner's franchise constitutes a contract and a substantial property right	21

Page

2. The purpose of the rental ordinance is not public 24
3. The ordinance is repugnant to the Federal Constitution 24
4. Petitioner's Federal rights were infringed by the way in which its appeal for constitutional protection of its contract and property rights was finally determined 25

Prayer 27

AUTHORITIES.

Amarillo v. *Ware* (1931), 120 Tex. 456, 466 24
Boise Water Co. v. *Boise City*, 230 U. S. 84, 86, 89, 90, 91, 92, 93 ..... 12, 18, 24
Carlson v. *California*, 310 U. S. 106, 109 11
Chapman v. *Crichet* (1936), 127 Tex. 590, 596 3
Cloverdale Homes v. *Cloverdale*, 47 L. R. A. (N. S.) 607 15
Columbia Ry. v. *South Carolina*, 261 U. S. 236, 251 .. 18
Cuyahoga Pow. Co. v. *Akron*, 240 U. S. 462, 464 11
Dallas v. *Dallas St. Ry. Co.* (1902), 95 Tex. 268, 275 . 22, 23
Dallas Ry. Co. v. *Geller* (1925), 114 Tex. 484, 488 .... 18, 22
Ennis Water Co. v. *Ennis*, 233 U. S. 652, 657, 658 16
Fletcher v. *Peck*, 6 Cranch 87, 136-139 14
Ft. Worth v. *S. W. Bell Tel. Co.* (5th Cir.), 80 F. (2d) 972, 975 23
Ft. Worth v. *Wiggins* (1928) (Com. App.), 5 S. W. (2d) 761, 764 24
Ft. Worth Gas Co. v. *Latex Oil & Gas Co.*, 299 S. W. 705, 709; writ ref. Dec. 1927, 118 Tex. 674 18
Galveston v. *Posnainsky* (1884), 62 Tex. 118, 127 ... 24
Galveston & W. Ry. Co. v. *Galveston* (1897), 90 Tex. 398, 412, 413 18
Geller v. *Dallas Ry. Co.*, 245 S. W. 254, 256 26
Hoefling & Son v. *San Antonio* (1892), 85 Tex. 228, 232 17
Holland v. *Nimitz* (1922), 111 Tex. 419, 430, 431 3
Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398, 434, 438, 439, 445 ..... 12, 13, 14

Page

Houston v. *Southwestern Tel. Co.*, 259 U. S. 318 22
Hurt v. *Cooper—The Chain Store Tax Cases* (1938), 130 Tex. 433, 438 17
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 99, 109 .... 13, 14, 16
Lawrence v. *State Tax Comm.*, 286 U. S. 276, 282 13
Louisville v. *Cumberland Tel. Co.*, 224 U. S. 649, 660-665 .... 23, 24
Lovell v. *Griffin*, 303 U. S. 444, 450 11
Macdonell v. *I. & G. N. Ry. Co.* (1883), 60 Tex. 590, 595 23
Martin v. *Hunter's Lessee*, 1 Wheat. 304, 340, 341, 342, 344, 347, 349 .... 13, 14
Mayor v. *Houston St. Ry. Co.* (1892), 83 Tex. 548, 554, 555, 558 .... 21, 22, 23
415, 416 .... 13, 25
Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405,
New Jersey Tel. Co. v. *Tax Board*, 280 U. S. 338, 348, 349 .... 13, 25
Northern Tex. Util. Co. v. *Community Nat. Gas Co.* (C. C. A.), 297 S. W. 904, 908; writ ref. Nov. 1927, 118 Tex. 686 23
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 118 18
Ostrom v. *San Antonio* (1901), 94 Tex. 523, 525, 526 24
Owensboro v. *Cumberland Tel. Co.*, 230 U. S. 58, 65 23
Panhandle Const. Co. v. *Lindsey* (1934), 123 Tex. 613, 623; Accord: *Chapman* v. *Crichet* (1936), 127 Tex. 590, 596 3
Parsons v. *Galveston* (1935), 125 Tex. 568, 576, 577 23
Russell v. *Sebastian*, 233 U. S. 195, 204, 206, 207, 210, 12, 13, 24
St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, 97, 63 Fed. 68, 72, 76; affirmed 166 U. S. 388 .... 13, 17, 25
San Antonio v. *San Antonio Pub. Serv. Co.*, 255 U. S. 547 22
San Antonio Trac. Co. v. *Altgelt*, 200 U. S. 304, 308 18
Scroggins v. *Harlingen* (1938), 131 Tex. 237, 247, 248 24
Southwestern Tel. & Tel. Co. v. *Dallas*, 174 S. W. 636, 639 26
State Freight Tax Case, 15 Wall. 232, 278 17
Texarkana v. *Arkansas Gas Co.*, 306 U. S. 188, 198-202, 204, 97 F. (2d) 6 .... 12, 22, 26

Page

T. & P. Ry. Co. v. *El Paso* (1935), 126 Tex. 86, 94, 95. 23
The Chain Store Tax Cases (*Hurt* v. *Cooper*), 130 Tex. 433, 438 17
Treigle v. *Acme Homestead Co.*, 297 U. S. 189, 197 .. 14
Tulsa v. *S. W. Bell Tel. Co.*, 75 F. (2d) 343, 356 15
Vilas v. *Manila*, 220 U. S. 345, 356 24
Worthen Co. v. *Kavanaugh*, 295 U. S. 56, 60, 62 14
W. B. Worthen Co. v. *Thomas*, 292 U. S. 426, 431, 432 14
Zucht v. *King*, 260 U. S. 174, 176 11

STATUTES.

Federal:
Sec. 237, Judicial Code, amended 11
Sec. 237 (a), Judicial Code. amended 12
Sec. 237 (b), Judicial Code, amended: 28 U. S. C. 344 (b) 3
Revised Civil Statutes of Texas, 1925:
Article 1016 19
Article 1436 19
Article 1497 18
Article 1728 23
Articles 1742, 1743 3
Article 1762 4

CONSTITUTIONS.

Federal Constitution:
Art. I, Sec. 10, Cl. 1 20
Art. VI, Clauses 2 and 3 ..... 13, 20
Sec. 1, 14th Amendment 20
Constitution of State of Texas:
Art. I, Sec. 17 ..... 22, 26
Art. V, Secs. 1 and 3 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY,
Petitioner,

vs.

CITY OF WEST UNIVERSITY PLACE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

To the Supreme Court of the United States:

Houston Lighting & Power Company, a Texas corporation chartered to generate, transmit and distribute electricity for public use, respectfully prays this Court, by certiorari, to review and determine cause No. 7621 styled *H. T. Fleming et al.,* plaintiffs in error v. *Houston Lighting & Power Co.,* wherein the Supreme Court of Texas, the highest court of the State (Tex. Const., Art. V, Secs. 1, 3), has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the Federal Constitution by petitioner against said ordinance.

I. Summary Statement Of The Matter Involved.

Petitioner furnishes the electric service used in said City under a fifty year franchise granted and accepted in May, 1930. Ordinance 129, enacted January 4, 1938, conditions petitioner's use of City's streets,[1] commencing August 1, 1938, on the payment of annual rental. As the means of collecting this rental, the ordinance provides that petitioner's use of the streets in conducting its business without paying the prescribed rentals shall be unlawful and punishable by $100 a day penalties, and that City's cancelable receipt for the last annual rental payment shall constitute petitioner's authority to use the streets.

Petitioner filed this suit during February 1938 in the State District Court to enjoin enforcement of the ordinance, and the case was tried and determined on its merits in July, 1938 before the first payment under the ordinance became due. The evidence relied on by petitioner to show the invalidity of the ordinance under the State law and the Federal Constitution was entirely undisputed, respondents standing on the ordinance and offering no evidence.

The District Court held Ordinance 129 "in all things valid and constitutional and * * * in full force and effect" (R. 27) and denied relief. The Court of Civil Appeals held the ordinance void as a matter of State law, reversed the judgment of the trial court, and rendered judgment granting the permanent injunction sought. The Federal questions, which petitioner duly reserved and presented by assignments of error (R. 104), were not reached, the Court of Civil Appeals regarding their consideration as unnecessary in view of the non-Federal ground for its judgment.

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[1] City has no alleys at all (R. 87), and no parks or other public grounds of any consequence (R. 68A). Streets, avenues and boulevards are all described herein as "streets".

The Supreme Court of Texas granted writ of error, took jurisdiction of and decided the case [2] by judgment reversing the Court of Civil Appeals and affirming the judgment of the District Court. This judgment the Supreme Court made final by entertaining and overruling two successive motions for rehearing, both filed by petitioner as a matter of right.

II. Opinions Below.

No opinion in the case has been officially reported.[3]

III. Jurisdictional Statement.

1. The statutory provision relied upon to sustain jurisdiction is Section 237 (b) of the Judicial Code, as amended: 28 U. S. C. 344 (b).

2. Ordinance 129, the validity of which is involved, is set out verbatim in the record (pp. 15-18), having been attached to plaintiff's petition and introduced in evidence in the District Court (R. 15).

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[2] When a case is taken on petition for writ of error and decided on its merits, as this case was, "the Supreme Court is not only clothed with the power but charged with the duty to determine all properly presented questions of law requisite to a correct decision of the case". *Holland* v. *Nimitz* (1922), 111 Tex. 419, 430, 431. The petition, filed in the Court of Civil Appeals, brings to the Supreme Court the entire record including the assignments of error. Arts. 1742, 1743, R. C. S., Tex., 1925. The party who has obtained reversal of an adverse judgment in the Court of Civil Appeals is entitled to a determination by the Supreme Court of all assignments of error necessary to a correct judgment of the case. *Panhandle Const. Co.* v. *Lindsey* (1934), 123 Tex. 613, 623. Accord: *Chapman* v. *Crichet* (1936), 127 Tex. 590, 596.

[3] The pages of the record and the unofficial reports where the three opinions filed in the case may be found are: (1) Court of Civil Appeals, opinion filed April 27, 1939 (R. 95), 128 S. W. (2d) 487; (2) Supreme Court of Texas, opinion adopted April 3, 1940 (R. 106), 138 S. W. (2d) 520, and opinion on rehearing adopted October 30, 1940 (R. 115), 143 S. W. (2d) 923.

The ordinance is set out here in footnote 4 with those sections omitted which are deemed not pertinent to the Federal questions involved:

3. The date on which the judgment of the Supreme Court of Texas sought to be reviewed became final is December 4, 1940. The judgment was entered April 3, 1940 (R. 111). Petitioner's first motion for rehearing (R. 112), duly filed as a matter of right (Art. 1762, R. C. S. Tex., 1925), was overruled October 30, 1940 (R. 116), pursuant to opinion on rehearing (R. 115). Petitioner's second motion for rehearing was filed November 13, 1940 (R. 118) in accordance with an order of the Supreme Court directing its Clerk to enter such motion on the Court's motion docket where "it will be duly entertained and determined by this Court

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[4] ORDINANCE No. 129

An ordinance fixing rentals to be paid by telegraph, telephone, electric, and gas companies for the privilege of using with their poles, wires, conduits, pipes, and fixtures the streets, easements, and alleys and other public ways within the City of West University Place, Texas, providing penalties for violation, and providing an emergency.

Be it ordained by the Board of Commissioners of the City of West University Place, Texas:

SEC. 1. That all persons, associations, organizations, and corporations using or maintaining any telegraph, telephone, electric light or other poles, gas pipe lines, pipes and other fixtures in any of the streets, highways, easements, alleys, parks or other places within the corporate limits of the City of West University Place, Texas, shall on the 1st day of August of each and every year file with the City Secretary a sworn report showing the gross receipts from the business conducted by such persons, associations, organizations and corporations within the corporate limits of the said city for the preceding year ending June 30th.

(SEC. 2, wherein City reserves power to examine company records to verify sworn reports, omitted.)

SEC. 3. That upon the 1st day of August of each and every year, every person, association, organization, or corporation occupying or using the streets, highways, easements, alleys, parks or other public places in the City of West University Place, Texas, with poles, pipes, and for other fixtures shall as a condition to such further occupancy pay to the city annually for such privileges a rental equal of four (4%) per cent of the gross receipts received by such person, association, organization, or corporation from its business con-

* * *" (R. 118). The Supreme Court overruled the second motion, "after due consideration of same", but without opinion, on December 4, 1940 (R. 120).

4. *The Federal questions were properly raised by plaintiff's petition filed in the District Court:* Petitioner, as plaintiff in the District Court, after averment of the facts in respect to petitioner's use of the streets to furnish service in the area from about 1920 to 1925, when the City was incorporated, and from 1925 until May, 1930, when the fifty year franchise was granted and accepted (R. 2-4), attached to plaintiff's petition a copy of said franchise, of petitioner's acceptance of said franchise and of Ordinance 129 (R. 12-18), and alleged:

12.

"Inasmuch as enforcement of said Ordinance 129 will impair the obligation of the franchise contract between City and company as herein above alleged, said

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ducted in the corporate limits of the City of West University Place, Texas, for the preceding year which sums shall be paid to the City of West University Place, Texas.

SEC. 4. That upon receipt of the above rental by the city, the City Secretary shall deliver to the person, association, organization, or corporation paying the same a receipt for such rental, which said receipt shall authorize such person, association, organization, or corporation to use and occupy the streets, highways, easements, alleys, parks and other public ways of the City in carrying on its business for twelve (12) months from August 1st of such year.

SEC. 5. That the rental for the privilege of using the streets, alleys, highways, easements, and public places of the City of West University Place provided for in this ordinance is not charged as a tax, but is made for the privilege now enjoyed and to be enjoyed by such persons, associations, organizations, and corporations of using the streets, easements, alleys, and other public ways of the city in the conduct of their respective businesses; and such charges are additional to all ad valorem and franchise taxes and to all taxes of every nature whatsoever against the persons, associations, organizations or corporations mentioned herein.

SEC. 6. That nothing herein is intended to relieve any person, association, organization, or corporation of any condition, restriction or requirement imposed by any law or ordinance of the said City of West University Place, Texas.

SEC. 7. That this ordinance does not grant a franchise to any utility or per-

ordinance is void because it violates section 10, Article I of the Constitution of the United States; and inasmuch as the enforcement of said ordinance will deprive plaintiff of its said property without plaintiff's consent and without compensating plaintiff therefor, said ordinance denies plaintiff due process of law and the equal protection of the laws, contrary to section 1 of the Fourteenth Amendment to said Federal Constitution (R. 7).

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son, association, organization or corporation to use the streets, easements, alleys and other public ways and shall never be so construed by the courts or otherwise, and the city reserves the right to cancel the privileges granted hereunder and refund the unearned rentals paid to the city.

(SEC. 8, wherein City reserves right to make other restrictions and regulations of poles, lines and equipment effective, omitted.)

SEC. 9. That every person, association, organization, and corporation who shall operate any business without the payment of the rentals provided for herein shall be subject to a penalty of One Hundred ($100.00) Dollars for each and every day that such person, association, organization, or corporation shall conduct such business using and occupying the streets, easements, alleys, or other public ways of the City of West University Place without the payment of the said rentals which said sum may be recovered by the City of West University Place in a court of competent jurisdiction by a suit filed therein.

(SEC. 10, wherein failure or refusal of any such company or its agent to report gross receipts annually or permit examination of company books is made offense punishable by fine not to exceed $100, each day to constitute a separate offense, omitted.)

(SEC. 11, which requires City's fire marshal and other designated employees to inspect utility lines and cause unsafe conditions to be corrected, is omitted because counsel for respondents stated on the record that City would not attempt to sustain the validity of the ordinance on the ground that it imposed a "license tax" or "tax under the regulatory power" (R. 85, 86). This statement was made during petitioner's proof that inspection of its equipment by City employees was not justified because of petitioner's own inspection system and use of automatic safety devices (R. 79-81; 92-94).

(SEC. 12, partial invalidity saving clause, omitted.)

SEC. 13. That the fact that telegraph, telephone, electric, and gas companies have been occupying and using the streets, easements, alleys and other public ways of the City of West University Place, Texas, for many years without the payment of rent for such use creates an emergency, and this ordinance shall take effect immediately upon its passage, approval and publication as required by law.

Passed and approved this January day of 4 A. D. 1938.

(Signatures omitted.)

13.

Plaintiff says that the recitals of said Ordinance 129 characterizing the levy provided therein as a rental charge for plaintiff's said occupancy of said streets are a pretext by which the City is attempting to disguise its attempt to exercise a taxing power which it does not possess. In support of this allegation, plaintiff has averred above that said City does not have the power to rent out its streets for the maintenance and operation thereover, therein and thereunder of plaintiff's said electric service property installed pursuant to said Article 1436 of the Texas statutes, and to said contracts and dedications of said landowners and subdividers and to said franchise granted to plaintiff by the City in 1930. Furthermore, said levy—being 4 per cent of the total gross receipts derived from plaintiff's ownership and operation of its electric generating, transmission and distribution property in the conduct of its business of furnishing electric service in said City—bears no reasonable or rational relationship to plaintiff's said occupancy of said streets, in that said levy is not related to the extent, or the manner, or the duration of said occupancy, but is related solely to the gross proceeds derived from said business and is a direct charge on said business. In so far as said levy is a charge upon property used to conduct plaintiff's said business by taking a fixed per cent of the proceeds derived from the use thereof, said charge is laid upon all the property so used, without regard to the location and operation of said property within or without said City, or whether or not occupancy of said streets is involved in the installation and operation thereof. In this connection, plaintiff shows that more than 70 per cent of the investment in property used and useful to furnish electric service in said City is represented by property located and operated outside the City's boundaries, that of about 25 miles of pole lines now installed in said City, only about 12 miles are located in said streets, and that of said 12 miles, approximately 4½

miles were installed prior to the incorporation of said City or its annexation of the area where said lines are installed. By reason of these facts, plaintiff says that Ordinance 129 is void because the levy provided thereby is unreasonable as applied by the City to plaintiff and its said property and business, and is repugnant * * * to * * * Sec. 1, 14th Amendment, Fed. Constitution" (R. 8).

17.

Plaintiff is not presently in need of injunctive relief against the enforcement of said street rental ordinance, but will be prior to August 1, 1938. Plaintiff filed this suit in February, 1938, after failing in its effort to secure a repeal of said ordinance, in order to test the validity thereof by trial of this suit on its merits prior to the time provided for the first report and payment under said ordinance. The loss and damage to plaintiff of the kinds and in the amounts heretofore alleged, will be irreparable. Unless said ordinance is set aside, the aggregate payments required of plaintiff thereunder for the unexpired term of its said franchise, assuming that plaintiff's said gross receipts will be the same as for 1937, will exceed $100,000. There is no method provided by statute or otherwise whereby plaintiff can pay over to said City the amount required to be paid on August 1, 1938, and still be secure in the full protection of its rights and in the certain recovery of said payment if said Ordinance 129 is subsequently found to be invalid.

Hence plaintiff is without a plain, complete, adequate and speedy remedy at law, and brings this action to prevent a multiplicity of suits, to protect its constitutional and statutory rights and immunities, and to restrain the great and irreparable injury and damage which plaintiff will suffer in its property and property rights if said ordinance is enforced" (R. 10).

5. *The questions raised and rights claimed under the Federal Constitution by petitioner were overruled and de-*

nied by the judgment of the District Court: The pertinent parts of this judgment are:

> "It is therefore ordered, adjudged and decreed that said ordinance No. 129 of the City of West University Place, which is here in controversy, is in all things valid and constitutional and is in full force and effect.
>
> It is further ordered, adjudged and decreed that the injunction and all other relief prayed for by plaintiff against each and all of the defendants herein is denied and refused.
>
> It is further ordered, adjudged and decreed that each and every issue in this case is adjudged against the plaintiff and in favor of the defendants" (R. 27).[5]

The Court of Civil Appeals overturned Ordinance 129 and gave petitioner the protection sought for its Federal constitutional rights upon nonfederal grounds (R. 102, 103), and did not pass upon the Federal questions duly reserved and presented by petitioner's assignments of error (R. 104).

6. *The questions raised and rights claimed under the Federal Constitution by petitioner were overruled and denied by the final judgment of the Supreme Court of Texas affirming the judgment of the District Court:*

The opinion adopted April 3, 1940 (R. 106), did not mention the raising of or set forth findings or conclusions passing expressly upon several of the nonfederal questions or any Federal question presented by the assignments. Petitioner's first motion for rehearing included the following grounds:

> "Fifth Ground.
>
> "The Supreme Court of Texas erred in refusing to consider, determine and sustain the question of law presented by company's Fifth Proposition, namely,

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[5] Petitioner reurged each Federal question by motion for new trial (R. 27), which motion the District Court overruled (R. 29).

"'Ordinance 129 unconstitutionally impairs the obligation of the contracts with the State and the City under which appellant has occupied and is using the streets,'

under the Fifth Assignment of Error, which reads:

"'The Court erred in refusing to hold that said Ordinance 129 is repugnant both to Sections 16 and 29, Article I, Texas Constitution and to clause 1, Section 10, Article I, Federal Constitution, in that said ordinance impairs the obligation of the contract made by plaintiff's acceptance of the City's said ordinance of May 29, 1930.'

"Seventh Ground.

"The Supreme Court of Texas erred in refusing to consider, determine and sustain company's Sixth Assignment of Error in so far as it reads as follows:

"'The Court erred in refusing to hold that said ordinance will operate to deprive plaintiff of its said street easements, together with the property installed therein and dependent thereon, without due process of law, and will deny plaintiff the equal protection of the laws, contrary to Section 1, Fourteenth Amendment, Federal Constitution.'

"Tenth Ground.

"The Supreme Court of Texas erred in refusing to hold that the annual charge levied on company by Ordinance 129 is so arbitrary and unreasonable as to deprive company of its property without due course or process of law, contrary to Section 19, Article I of the Texas Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States" (R. 113-114).

Petitioner prayed the Supreme Court to:

"3. Pass on and sustain all the questions raised under the State and Federal Constitutions against the validity of the ordinance" (R. 114).

This motion was overruled October 30, 1940 (R. 116), pursuant to an opinion on rehearing which expressly overruled petitioner's assignments urging that Ordinance 129, as a matter of substance, levied an excise tax, but which did not mention or pass expressly upon any of the grounds of the motion reurging the assignments presenting Federal questions (R. 115).

Petitioner calls attention to its application filed (R. 116) and granted (R. 117) November 6, 1940, for an order directing that a seasonable second motion for rehearing be filed, entertained and determined, to its second motion for rehearing filed November 13, 1940, and the grounds of said motion (R. 118), to the order filed December 4, 1940, overruling said second motion for rehearing without opinion (R. 120), to petitioner's motion for a certificate by the Justices of the Supreme Court of Texas that the Federal questions had been presented, entertained and overruled (R. 120), to the appendix attached to this motion tracing the raising and presentation of the Federal questions at every stage of the cause in the State courts (R. 121), and to the order entered January 22, 1941, overruling the motion for certificate without opinion or explanation (R. 123).[6]

7. Ordinance 129, having been finally sustained by the highest court of the State, is a law passed by the State within the meaning of Art. I, Sec. 10, Cl. 1 of the Federal Constitution (*Cuyahoga Pow. Co.* v. *Akron,* 240 U. S. 462, 464; *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Carlson* v. *California,* 310 U. S. 106, 109), and is a statute of the State within the meaning of Sec. 237 of the Judicial Code, amended (*Zucht* v. *King,* 260 U. S. 174, 176).

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[6] The rule that "a motion for rehearing which is duly presented within fifteen days from the date of the last opinion in the case will be filed, entertained and determined" (R. 117) is an unwritten rule based upon customary practice and evidenced only by verbal instructions to the Clerk.

8. *The questions involved are substantial:* They were seasonably and properly raised and urged against the validity of the ordinance from the time the suit was filed at every stage of the litigation in the State courts; their grounds are that the ordinance is repugnant to the Federal Constitution; they set up rights and immunities under the Federal Constitution and appeal for a judicial remedy to prevent infringement; and this remedy was denied by final judgment of the highest court of the State in favor of the validity of the ordinance and declaring it to be in full force and effect. An appeal could be taken as a matter of right (Sec. 237 (a), Jud. Code, amended) because, unlike the questions involved in *Zucht* v. *King, supra,* these questions were decided below in a way not in accord with the applicable decisions of this Court.

IV. Questions Presented.

1. Does Ordinance 129 impair the obligation of petitioner's franchise?

(Petitioner contends that this question was decided in a way that is not in accord with *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 198-202; *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 92, 93, and *Russell* v. *Sebastian,* 233 U. S. 195, 204.)

2. Does the enforcement of the ordinance deprive petitioner of the use of said franchise without due process of law?

(Petitioner contends that this question was decided in a way that is not in accord with *Boise Water Co.* v. *Boise City* and *Russell* v. *Sebastian, supra;* and *Louisville* v. *Cumberland Tel. Co.,* 224 U. S. 649, 661-664.)

3. (a) Is the ordinance arbitrary and oppressive?

(Petitioner contends that this question was decided in a way that is not in accord with *Home Bldg. & Loan Assn.*

v. *Blaisdell,* 290 U. S. 398, 434, 439, 445; *St. Louis* v. *Western Union Tel. Co.,* 148 U. S. 92, 97; *New Jersey Tel. Co.* v. *Tax Board,* 280 U. S. 338, 348, 349.)

(b) Did the Supreme Court of Texas refuse to determine the Federal question of reasonableness upon evidence?

(Petitioner relies on *Nashville, C. & St. Ry.* v. *Walters,* 294 U. S. 405, 415, 416.)

4. Did the Supreme Court of Texas deny petitioner its Federal constitutional rights by deciding the case in a way that is not in accord with Article VI, Clauses 2 and 3 of the Federal Constitution?

(Petitioner relies on *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 340, 341, 342, 344, 347-349, and *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.)

V. Reasons Relied On for the Allowance of the Writ.

1. The validity of Ordinance 129 was drawn in question as being repugnant to the Federal Constitution and its validity sustained. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 99. Contract and property rights protected by the Federal Constitution (*Russell* v. *Sebastian,* 233 U. S. 95, 204) were properly set up and their infringement claimed, and the infringing legislation has been upheld by the highest court of the State. *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.

2. The highest court of the State has decided Federal questions of substance in a way not in accord with the applicable decisions of this Court. See decisions cited under IV Questions Presented, *supra,* pp. 12, 13.

3. *The questions are of general public importance:* The wider availability of electric service through lower cost to the user—in the home, on the farm and for defense—is a national aim. Franchises to maintain lines over public

thoroughfares are an essential part of the right of way for that service. The integrity of that right of way depends upon the sanctity of the franchise contract and protection of the property rights created thereunder.

The purpose of the infringing legislation is not public. The need to restrain arbitrary use of penal legislation to serve private ends is never more pressing than at a time when the scope of sovereign power is being extended. Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434, 438, 439; *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 431, 432; *Worthen Co.* v. *Kavanaugh,* 295 U. W. 56, 60, 62; *Treigle* v. *Acme Homestead Co.,* 297 U. S. 189, 197; *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 109.

A foundation rule of property is that a grant not only conveys the title granted, but implies a contract not to reassert that title against the grantee. *Fletcher* v. *Peck,* 6 Cranch 87, 136-139. The holding of the State court has far-reaching significance. It is that the grantor of the right of way easement for an essential form of public utility service, after the grant has been made and while it is being acted upon, may rescind the grant for the purpose of collecting a new consideration for the further use of that right of way.

A review is necessary, in the interest of the law, to maintain uniformity of decision upon rights and immunities protected by the Federal Constitution. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347, 348.